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CHAPTER 1

Nationality, Citizenship, and Immigration

A. NATIONALITY AND CITIZENSHIP

1. U.S. Response to Questions on Deprivation of Nationality from the UN High Commissioner for Human Rights

In February 2013, the United States provided its written response to questions circulated by the UN High Commissioner for Human Rights in a note dated January 15, 2013 concerning human rights and arbitrary deprivation of nationality. The note from the UN High Commissioner for Human Rights referenced Human Rights Council Resolution 20/5 (2012), which, among other things, requested that the Secretary General collect information to prepare a report on state measures that may lead to the deprivation of nationality. The U.S. response is excerpted below. Both the U.S. response and the note from the UN High Commissioner for Human Rights are available at *www.state.gov/s/l/c8183.htm*.

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Background

Under the Fourteenth Amendment of the Constitution of the United States, "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." The Immigration and Nationality Act (INA) § 101(a)(23) provides that "'naturalization' means the conferring of nationality . . . on a person after birth, by any means whatsoever." The INA also provides for the acquisition of citizenship at birth by a child born abroad to one or two American parent(s) provided that statutory requirements are met. INA §§ 301 and 309. Thus, in general, United States citizenship may be acquired by birth in the United States, birth abroad to an American parent(s) under specified statutory terms, or after birth by naturalization under procedures provided for in U.S. law.

U.S. laws governing nationality and citizenship, and immigration as a general matter, are not specifically drafted to address statelessness, although in many circumstances these laws can provide important protections against this problem. Because United States law recognizes both the principle of *jus soli* and *jus sanguinis* for the acquisition of citizenship, U.S. law does not generally contribute to the problem of statelessness. In addition, the United States Supreme Court has affirmed that American citizenship cannot be relinquished except upon the voluntary commission of an expatriating act with the *intention to relinquish* citizenship. As the United States Supreme Court held in *Afroyim v. Rusk*:

> "In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world—as a man without a country. Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry. The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship."

387 U.S. 253, 268 (1967). Additionally, U.S. citizenship laws do not discriminate on the basis of race, national origin, ethnic origin, religion, or gender grounds. These three principles, taken together, provide important protections against statelessness in the United States. These aspects of U.S. law are more fully discussed in response to specific questions below.

The United States recognizes the right of expatriation and U.S. citizens can lose their citizenship through *voluntary* performance of an expatriating act *with the intention of relinquishing citizenship.* A U.S. citizen may exercise this right even in circumstances which could result in statelessness. In addition, a naturalized U.S. citizen who acquires citizenship after birth is subject to denaturalization if naturalization is improperly obtained (e.g., through fraud). Revocation procedures may take place in such cases even if the individual in question is thereby rendered stateless.

Information on U.S. Legislative Measures

1. On what grounds can nationals lose or be deprived of their nationality?

U.S. law provides for loss of citizenship by voluntary commission of an expatriating act with the intention of relinquishing citizenship or through revocation of naturalization. INA § 349, *Loss of Nationality by Native-Born or Naturalized Citizen*, describes expatriating acts that result in loss of citizenship when performed voluntarily and with the intention of relinquishing United States nationality. Subsection 349(b) provides when loss of nationality is in issue that "the burden shall be upon the person or party claiming that such loss has occurred, to establish such claim by a preponderance of the evidence." For certain acts covered by § 349, such as obtaining citizenship by naturalization in a foreign state, the United States applies an administrative standard that U.S. citizens intend to retain their U.S. citizenship. INA § 340, *Revocation of Naturalization*, sets forth the grounds and procedures for loss of citizenship by a naturalized U.S. citizen. Such cases must be brought in the Federal courts of the United States,

and may be pursued in circumstances where the order admitting the person to citizenship and the certificate of naturalization were "illegally procured or were procured by concealment of a material fact or by willful misrepresentation."

2. Can an individual only lose or be deprived of nationality if he or she would not be rendered stateless? If so, are there exceptions to this rule? How are any such legislative safeguards against statelessness implemented in practice?

No, the United States recognizes the right of expatriation as an inherent right of all people, and U.S. citizens can lose their nationality through voluntary performance of an expatriating act with the intention of relinquishing citizenship. U.S. citizens may exercise this right even where this would result in statelessness. Nonetheless, the United States has set forth administrative procedures to ensure potentially stateless persons will be informed of the severe hardships that could result. See 7 FAM 1215 and 1261. Separately, a U.S. citizen by naturalization may be denaturalized if such status was improperly obtained. These procedures also could result in statelessness if the person does not possess or acquire another nationality.

3. Does the law ensure that individuals are not deprived of nationality on discriminatory grounds such as race, colour, sex, language, religion, political or other opinion, disability, national or social origin, property, birth or other status?

The steps leading to loss of U.S. citizenship under the procedures in §§ 340 and 349, as outlined above, are applied on a non-discriminatory basis, and do not take into account race, sex, religion, political opinion, disability, or other such factors. Loss of U.S. nationality is based on voluntary performance of an expatriating act with intent to relinquish citizenship or revocation of citizenship improperly obtained through naturalization. Further, INA § 311, *Eligibility for Naturalization*, provides that "[t]he right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such a person is married."

4. What procedures exist for acquisition of documentation proving nationality by individuals who have automatically acquired nationality at birth or, where relevant, upon State succession? What documentation and other requirements must be satisfied by individuals who apply for proof of nationality? How many applicants for such proof of nationality are rejected because they are unable to meet the requirements?

Persons acquiring citizenship through birth in the United States may apply for a U.S. passport, which serves both as a travel document and as proof of U.S. citizenship. The Passport Application Form DS-11, available at *http://travel.state.gov/passport*, describes the documentation required to be submitted with the application to demonstrate U.S. citizenship. A certified birth certificate showing birth in the United States is the most common primary evidence of citizenship, but many other forms of evidence demonstrating birth in the United States may be submitted. A child who acquires U.S. citizenship through birth abroad to an American parent (or parents) may be issued a "Consular Report of Birth Abroad of a Citizen of the United States" (CRBA) by a consular officer abroad. See 7 FAM 1441. These forms of proof of citizenship are addressed in the State Department Basic Authorities Act § 33 (22 U.S.C. § 2705), which provides:

> The following documents shall have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship . . . :
> (1) A passport, during its period of validity . . . issued by the Secretary of State to a citizen of the United States.

(2) The report, designated as a "Report of Birth Abroad of a Citizen of the United States," issued by a consular officer to document a citizen born abroad.

INA § 338, *Certificate of Naturalization*, provides for persons who obtain citizenship through naturalization to obtain a certificate of naturalization which states that the applicant has been admitted as a citizen of the United States of America. INA § 341, *Certificates of Citizenship*, provides for issuance of a certificate of citizenship in specific situations.

5. Do all children born on the territory of the State acquire nationality if they would otherwise be stateless? If so, does this occur automatically or upon application? If conditions apply, please list them. How many individuals have benefited from these provisions?

In nearly all cases, children born in the United States acquire U.S. nationality. Under the Fourteenth Amendment to the Constitution of the United States, all persons born within the United States and subject to its jurisdiction are citizens. INA § 301, *Nationals and Citizens of the United States at Birth*, similarly provides that a person "born in the United States, and subject to the jurisdiction thereof" shall be a national and citizen of the United States. Children born in the United States to a sitting foreign head of state or to diplomats accredited to the United States are not subject to U.S. jurisdiction, and thus are an exception to the principle of *jus soli* and do not acquire U.S. citizenship. (The Code of Federal Regulations (CFR), 8 CFR 101.3, addresses the circumstances of children born to foreign diplomats in the United States and provides for lawful permanent resident status.) These principles for acquisition of U.S. citizenship apply in all cases, and without regard to whether the child would otherwise be stateless.

6. Do all children born to nationals who are abroad acquire nationality? If not, do they acquire nationality if they would otherwise be stateless? If conditions apply, please list them. How many individuals have benefited from these provisions?

Children born abroad to U.S. citizens can acquire U.S. citizenship under conditions prescribed by statute. In general, whether a foreign born child acquires U.S. citizenship at birth depends upon a combination of factors, including the citizenship status of the parents (the rules vary depending on whether one or both are U.S. citizens), their marital status (the rules differ for children born to parents who are not married to each other), and the parents' length of residence or physical presence in the United States prior to the birth. See, generally, INA §§ 301 and 309. A foreign born child can also become a naturalized U.S. citizen, acquiring U.S. citizen after birth, upon fulfilling certain conditions specified by statute. Thus, INA § 320, *Children Born Outside the United States and Residing Permanently in the United States; Conditions Under Which Citizenship Automatically Acquired*, provides that a child born outside the United States automatically becomes a U.S. citizen where 1) at least one parent is a citizen, whether by birth or naturalization; 2) the child is under 18 years of age; and 3) the child is legally residing in the United States with the citizen parent. INA § 322, *Children Born and Residing Outside the United States; Conditions for Acquiring Certificate of Citizenship*, sets forth conditions for a foreign born child residing abroad to obtain U.S. citizenship when at least one parent is a U.S. citizen. Again, these rules for acquisition of U.S. citizenship apply in all cases, and without regard to whether the child in question would otherwise be rendered stateless.

7. Does the law provide a right to a fair hearing by a court for an individual who is: (i) denied issuance of documentation proving nationality; and/or (ii) affected by loss or deprivation of nationality?

Principles of due process are enshrined in the Constitution of the United States, and, as with any legal action in the United States, apply to proceedings over loss of nationality or denial of documentation to prove nationality. Numerous provisions of the INA ensure that due process rights are observed. Under INA § 336, *Hearings on Denials of Applications for Naturalization*, if an application for naturalization is administratively denied the applicant may request a hearing before an immigration officer. If the immigration officer also denies the application, INA § 310(c), *Judicial Review*, provides that the applicant may seek review in Federal court and directs the court to conduct a *de novo* review of the application. INA § 340, *Revocation of Naturalization*, requires that the United States institute revocation proceedings in the Federal district court where the naturalized citizen resides, and requires sixty days personal notice of such action to the citizen. Under INA § 349, *Loss of Nationality by Native-Born or Naturalized Citizen*, after identifying the expatriating acts that may lead to loss of citizenship, subsection (b) states "[w]henever the loss of United States nationality is put in issue in any action or proceeding . . . under, or by virtue of, the provisions of this or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence." Thus, U.S. law places the burden to show loss of citizenship on the party asserting such loss, i.e., generally on the U.S. Government. Finally, INA § 360, *Proceedings for Declaration of United States Nationality in the Event of Denial of Rights and Privileges as National*, allows any person within the United States who is denied a right or privilege on the ground that he or she is not a national of the United States (e.g., such as denial of a passport) to file an action in Federal district court where the applicant resides for a judgment declaring him or her to be a national of the United States, except where nationality is in issue and may be addressed in removal proceedings.

8. If a person is found to have been arbitrarily deprived of his or her nationality, does the law make provision for an effective remedy, including restoration of the person's nationality?

Yes, INA § 360, *Proceedings for Declaration of United States Nationality in the Event of Denial of Rights and Privileges as National*, permits a person deprived a right or benefit of citizenship to file an action for a declaratory judgment finding him or her to be a national. In such an action, U.S. law authorizes the court to "declare the rights and other legal relations of any interested party seeking such declaration . . . [and] [a]ny such declaration shall have the force and effect of a final judgment or decree." See 28 USC § 2201.

9. What are legislative and administrative measures leading to the deprivation of nationality of individuals or groups of individuals that would be considered arbitrary within your constitutional framework?

Measures leading to loss of nationality that failed to comport with the U.S. Constitution and the provisions of U.S. law, including due process, could be considered arbitrary in the United States and would be addressed through judicial process as described above.

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2. Passports as Proof of Citizenship

See discussion in Section 1.B., below, of cases involving the use of passports as proof of U.S. citizenship.

3. Proof of Citizenship Issued Erroneously

On January 22, 2013, the United States submitted its brief on appeal in a case brought by an individual born in Yemen challenging the Department's revocation of his Consular Report of Birth Abroad of a Citizen of the United States ("CRBA") and U.S. passport. *Hizam v. Clinton*, No. 12-3810 (2d. Cir.). The plaintiff, Abdo Hizam, brought suit under 8 U.S.C. § 1503 seeking to have his CRBA reissued. Although Mr. Hizam conceded that his U.S. citizen father did not meet the statutory requirements to transmit citizenship to him at birth (not having resided in the United States the requisite number of years prior to his son's birth), he nonetheless argued that he was entitled to keep his CRBA, which serves as proof of U.S. citizenship, on the ground that the State Department lacked any authority to revoke it. Ruling on cross-motions for summary judgment, the district court agreed with Mr. Hizam and ordered the State Department to reissue the CRBA. The United States brief on appeal is excerpted below (with footnotes omitted) and available at www.state.gov/s/l/c8183.htm.

* * * *

Under the United States Constitution, there are "two sources of citizenship, and two only—birth and naturalization." *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898)…A person born outside the United States, such as Hizam, may acquire citizenship at birth only as provided by an act of Congress. *Rogers*, 401 U.S. at 828, 830-31; … In interpreting such a statute, courts must accord "[d]eference to the political branches" and apply " 'a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.' " *Miller*, 523 U.S. at 434 n.11 (plurality) (quoting *Mathews v. Diaz*, 426 U.S. 67, 82 (1976)). Thus, " '[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with.' " *Rogers*, 401 U.S. at 830 (quoting *United States v. Ginsburg*, 243 U.S. 472, 475 (1917)).

Congress has provided the terms under which a child born abroad to a U.S. citizen parent or parents acquires automatic U.S. citizenship at birth. Citizenship of a person born abroad is determined by the law in effect at the time of birth. *Drozd*, 155 F.3d at 86. In 1980, the year of Hizam's birth, the Immigration and Nationality Act granted citizenship to a child born in wedlock to one U.S. citizen parent if that parent was "physically present in the United States . . . for a period or periods totaling not less than ten years prior to the birth of the child." 8 U.S.C. § 1401(g) (Supp. III 1980).

Hizam does not dispute that his U.S. citizen father did not meet the physical-presence requirement. (JA 112 (Ali Hizam's physical presence was "less than 10 years . . . since Ali Hizam first arrived in the United States in 1973 and [Hizam] was born in 1980")). Accordingly, Hizam did not acquire U.S. citizenship at birth. Nor does he allege that he is a citizen by virtue of a different statutory provision conferring citizenship at birth, by birth in the United States, or by naturalization. Accordingly, it is beyond doubt that Hizam is not, and never has been, a U.S. citizen.

B. Because He Did Not Acquire U.S. Citizenship at Birth or Through Naturalization, Hizam Is Not Entitled to a CRBA or U.S. Passport

Because Hizam is not a U.S. citizen, he is not entitled to a CRBA or U.S. passport.

1. Legal Authorities Governing CRBAs and U.S. Passports

Congress has charged the Secretary of State with the duty of "determining [the] nationality of a person not in the United States." 8 U.S.C. § 1104(a). Pursuant to that power, the State Department adjudicates the citizenship claims of persons born abroad and, where appropriate, issues CRBAs and U.S. passports. 22 C.F.R. § 50.7(a); see 8 U.S.C. § 1504(b) (CRBA is "issued by a consular officer to document a citizen born abroad"); *Zivotofsky*, 132 S. Ct. at 1436 (Alito, J., concurring in judgment) ("a CRBA is a certification made by a consular official that the bearer acquired United States citizenship at birth").

Like a CRBA, a U.S. passport may only be issued to a citizen or other national of the United States. 22 U.S.C. § 212; 22 C.F.R. § 51.2(a). Both a CRBA and a valid U.S. passport serve as proof of citizenship. 22 U.S.C. § 2705 ("same force and effect as proof of United States citizenship" as naturalization certificate or citizenship certificate).

While the State Department has the authority to make citizenship determinations in connection with adjudicating applications for citizenship documents, it does not have the authority to confer or revoke citizenship status itself. See 8 U.S.C. § 1421(a) ("The sole authority to naturalize persons as citizens of the United States is conferred upon the Attorney General."); *Perriello v. Napolitano*, 579 F.3d 135, 139-40 (2d Cir. 2009) (same).

2. The District Court Lacked Authority to Direct the State Department to Return the CRBA

Although Hizam is not entitled to a CRBA or U.S. passport because he is not a U.S. citizen, see infra Point B.3, as a threshold matter the district court lacked authority to direct the State Department to provide those documents. Hizam brought this action under 8 U.S.C. § 1503. That statute provides that a person in the United States who "claims a right or privilege as a national of the United States," but is "denied such right or privilege . . . upon the ground that he is not a national of the United States," may "institute an action under [the Declaratory Judgment Act] against the head of [the] department or independent agency [that denied the claim of nationality] for a judgment declaring him to be a national of the United States." 8 U.S.C. § 1503(a). Neither Hizam nor the district court invoked any source of authority other than § 1503. (JA 1, 3 (relying solely on § 1503)); (JA 158, 163 (same)).

Thus, the district court's authority was limited to declaring that Hizam is a citizen or national of the United States. Yet the district court did not enter such a declaration—presumably because it lacked any ground on which to do so, as Hizam is indisputably not a U.S. citizen or national. See supra Point A. Instead, the district court ordered the State Department to reissue a CRBA to Hizam—a remedy that the court had no authority to grant under § 1503.

Moreover, the district court had no other power to enter the order it did, which effectively required the State Department to violate Congress's statutory citizenship scheme by issuing

proof of citizenship to a person who is not a U.S. citizen. "[T]he power to make someone a citizen of the United States has not been conferred upon the federal courts . . . as one of their generally applicable equitable powers," and therefore " '[o]nce it has been determined that a person does not qualify for citizenship, the district court has no discretion to ignore the defect and grant citizenship.' " *INS v. Pangilinan*, 486 U.S. 875, 884 (1988) (quoting *Fedorenko v. United States*, 449 U.S. 490, 517 (1981) (alteration omitted)); accord 8 U.S.C.§ 1421(d) (naturalization may occur "in the manner and under the conditions prescribed in [the INA] and not otherwise" (emphasis added)). Thus, a court may not grant citizenship "by the application of the doctrine of equitable estoppel, nor by invocation of equitable powers, nor by any other means." *Pangilinan*, 486 U.S. at 884-85; accord *Mustanich v. Mukasey*, 518 F.3d 1084, 1088 (9th Cir. 2008) (statutory requirement for naturalization "cannot be ignored," even where agency misconduct alleged, because "[e]stoppel in these circumstances would amount to precisely the type of equity-based departure from the requirements of the immigration statutes that *Pangilinan* prohibits")…

Although the district court did not explicitly order the government to confer citizenship on Hizam, it directed the State Department to issue a CRBA—a document that may be issued only to persons who acquired U.S. citizenship at birth according to the terms of a statute, and which (like a U.S. passport) has "the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction." 22 U.S.C. § 2705. Thus, the illogical and impermissible effect of the district court's order is that Hizam will be entitled to prove citizenship that he does not have. Additionally, on the basis of his court-ordered, nonrevocable CRBA, Hizam may enjoy most if not all of the benefits of U.S. citizenship, including obtaining a U.S. passport (which he has already done), filing an immediate-relative petition for his alien wife so that she may obtain an immigrant visa, and applying for CRBAs and U.S. passports for his children. The ultimate effect is the same as if the court had simply declared Hizam to be a U.S. citizen as a matter of equity, something it lacks authority to do. *Pangilinan*, 486 U.S. at 883-85. Because the district court's order was outside its lawful power, it must be reversed.

3. The State Department Acted Lawfully in Canceling Hizam's Erroneously Issued CRBA and U.S. Passport

In any event, the State Department acted lawfully in revoking Hizam's erroneously issued CRBA and U.S. passport.

a. The State Department Is Authorized to Cancel or Revoke Erroneously Issued CRBAs and U.S. Passports

As provided in 8 U.S.C. § 1504, the State Department may "cancel" a CRBA or U.S. passport "if it appears that such document was illegally, fraudulently, or erroneously obtained." 8 U.S.C. § 1504(a). Such a cancellation "shall affect only the document and not the citizenship status of the person in whose name the document was issued." *Id.*

Section 1504, enacted in 1994, codified the State Department's existing administrative authority to correct agency or other errors, specifically with respect to erroneously issued CRBAs and U.S. passports. As the Supreme Court recognized in *Haig v. Agee*, although the statute granting the Secretary of State the power to issue passports "does not in so many words confer upon the Secretary a power to revoke [or deny] a passport," "[n]either, however, does any statute expressly limit those powers." 453 U.S. at 290. The Court concluded that "[i]t is beyond dispute that the Secretary has the power to deny a passport for reasons not specified in the statutes," and that it was conceded that "if the Secretary may deny a passport application for a

certain reason, he may revoke a passport on the same ground." *Id*. at 290-91. That the power to revoke a passport inheres in the power to grant one has been "consistent[ly]" reflected in the State Department's regulations, promulgated pursuant to its "broad rule-making authority." *Id*. at 291 & n.20 (quotation marks omitted); see also Exec. Order 7856, ¶ 124 (Mar. 31, 1938) (granting Secretary of State "discretion . . . to withdraw or cancel a passport already issued"); Exec. Order 11,295 (Aug. 5, 1966) (superseding Exec. Order 7856 and delegating to Secretary of State power to promulgate "rules governing the granting, issuing, and verifying of passports" (emphasis added)).

More generally, agencies have inherent authority to correct their own errors. *NRDC v. Abraham*, 355 F.3d 179, 202-03 (2d Cir. 2004) (noting "power to reconsider decisions reached in individual cases by agencies in the course of exercising quasi-judicial powers"); *Dun & Bradstreet Corp. Foundation v. U.S. Postal Service*, 946 F.2d 189, 193 (2d Cir. 1991) ("It is widely accepted that an agency may, on its own initiative, reconsider its interim or even its final decisions, regardless of whether the applicable statute and agency regulations expressly provide for such review."); *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1360-61 (Fed. Cir. 2008); *Last Best Beef, LLC v. Dudas*, 506 F.3d 333, 340 (4th Cir. 2007). That inherent power applies even when the error is "inadvertent," and when several years pass before the error is detected. *American Trucking Ass'ns v. Frisco Transp. Co.*, 358 U.S. 133, 145 (1958) ("the presence of authority in administrative officers and tribunals to correct such errors has long been recognized—probably so well recognized that little discussion has ensued in the reported cases"). And it applies as well even when a person has relied to his detriment on the agency error, for as the Supreme Court has recognized, because "Congress, not the [agency], prescribes the law," an agency's error cannot subvert federal statutory requirements. *Dixon v. United States*, 381 U.S. 68, 72-73 (1965) (agency "empowered retroactively to correct mistakes of law. . . even where a [person] may have relied to his detriment on the [agency's] mistake") …

The State Department properly exercised these inherent powers in this case. There is no doubt that the State Department could and should have denied the applications for a CRBA and U.S. passport for Hizam when they were submitted, because Hizam's father did not meet the statutory requirement for physical presence in the United States and therefore could not transmit citizenship to Hizam at birth. See 22 C.F.R. §§ 50.7 (CRBA issued only upon "submission of satisfactory proof"), 51.2 (passport may only be issued to U.S. national). Accordingly, as the Supreme Court recognized in *Agee*, the State Department has inherent authority to revoke those documents, thus correcting its initial error.

Additionally, the State Department acted properly under its § 1504(a) authority, which permits it to "cancel" CRBAs and U.S. passports if they were issued "erroneously." While Hizam argued in the district court that § 1504(a) only allows cancellation of citizenship documents if the applicant, rather than the agency, committed an error, that contravenes the plain text of § 1504, which contains no such limitation. See *Friend v. Reno*, 172 F.3d 638, 640, 646-47 (9th Cir. 1999) (citizenship certificate may be revoked if obtained through agency error alone, even when applicant "fully disclosed" truthful but legally incorrect basis of claim to citizenship). Moreover, any rule that citizenship documents issued through agency error cannot be revoked is inconsistent with the fundamental principle that "there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship," and if those statutory conditions are not met the citizenship has been " 'illegally procured,' and naturalization that is unlawfully procured can be set aside." *Fedorenko*, 449 U.S. at 506…

b. The District Court Erred in Rejecting the State Department's Authority to Revoke Erroneously Issued Citizenship Documents

In determining that the State Department has no power to revoke Hizam's CRBA and U.S. passport, the district court relied on two arguments. First, the court held that 22 U.S.C. § 2705, as interpreted by the Ninth Circuit, precludes the State Department from revoking those documents. Second, the court held that because statutes are presumed not to apply retroactively, § 1504 cannot be validly applied to the issuance of CRBAs and U.S. passports prior to its 1994 enactment. Both contentions are incorrect.

i. Section 2705 Does Not Preclude Cancellation of Citizenship Documents

First, § 2705—which provides that valid U.S. passports and CRBAs "have the same force and effect as proof of United States citizenship as certificates of citizenship issued by the Attorney General or by a court having naturalization jurisdiction"—does not address the State Department's authority to cancel documents issued in error to a person who is not a U.S. citizen. As is clear from the text of the statute itself, § 2705 concerns the evidentiary force and effect of CRBAs and U.S. passports, but says nothing about the State Department's ability to cancel or revoke them, or any procedures it must follow in doing so.

In concluding to the contrary, the district court relied on the Ninth Circuit's decision in *Magnuson v. Baker*, which held that by providing that CRBAs and U.S. passports have the "same force and effect" as certificates of citizenship or naturalization, § 2705 thereby also incorporated the procedural and substantive requirements specified in separate statutes for the revocation of the latter certificates. 911 F.2d 330, 333-36 (9th Cir. 1990). But *Magnuson* was wrongly decided, and the district court erred in following it.

To begin with, *Magnuson* is inconsistent with the text of § 2705. As noted above, that text concerns only the evidentiary force and effect of the documents at issue. But the Ninth Circuit unreasonably inferred that by specifying the "force and effect" those documents would have as "proof" of citizenship, Congress also incorporated requirements for revoking those documents, such that revocation could only occur after a hearing and only on the grounds of fraud or illegality. *Id*. at 335. Had Congress intended to adopt those procedural and substantive requirements, it surely would have done so by saying so—as it did for certificates of citizenship and naturalization, see 8 U.S.C. §§ 1451, 1453—rather than requiring courts to discern those protections in language that does not mention them. Indeed, it would make no sense for Congress to specify procedures for the revocation of CRBAs and U.S. passports by reference to two other sets of procedures that differ significantly from each other, leaving courts to guess which of them must be applied. See 8 U.S.C. §§ 1451 (district court proceedings for revoking naturalization order and canceling naturalization certificate), 1453 (administrative proceedings for canceling certificates of citizenship or naturalization). The Ninth Circuit held that if it did not incorporate the procedures required for revoking a citizenship or naturalization certificate into the process for canceling a passport, it would "accord those who use their passport as evidence of their citizenship less protection than those who use other documents as evidence denoting citizenship," contradicting § 2705. 911 F.2d at 335. But that confuses the ability to use a document, which is protected by § 2705, with the right to have it in the first place, a subject on which the statute is silent.

Moreover, both the *Magnuson* court and the district court misunderstood the nature of the documents they considered. As reflected in § 2705, a CRBA documents that a child born abroad acquired United States citizenship at birth. See 8 U.S.C. § 1504(b); 22 C.F.R. § 50.7(a); 75 Fed. Reg. 36,522, 36,525 (2010). But neither a CRBA nor a U.S. passport can confer U.S. citizenship

upon a person who is not a citizen, and neither their issuance nor their cancellation has any effect on a person's underlying U.S. citizenship status. A child born abroad automatically acquires U.S. citizenship at birth if the statutory requirements are met, regardless of whether that person is ever issued a CRBA or U.S. passport. Just as a person who has never applied for or been issued a CRBA or U.S. passport could have nonetheless acquired citizenship at birth, a person, like Hizam, who was erroneously issued a CRBA does not become a U.S. citizen by virtue of that mistake. And if a person acquired U.S. citizenship at birth, that status is unaffected even if that person's U.S. passport or CRBA is revoked: as 8 U.S.C. § 1504 states, "[t]he cancellation under this section of any document purporting to show the citizenship status of the person to whom it was issued shall affect only the document and not the citizenship status of the person in whose name the document was issued."

Because CRBAs and passports have different functions from certificates of citizenship and naturalization, both the district court and Magnuson erred in imposing the more rigorous procedures specified for revoking a naturalization certificate on the revocation of a CRBA or U.S. passport. To establish eligibility for a U.S. passport, a naturalized citizen must show that naturalization occurred, typically by producing a naturalization certificate. But a person born abroad who acquired U.S. citizenship at birth may simply prove that the requirements of the applicable citizenship transmission statute were met, regardless of whether he or she has previously been issued a CRBA or U.S. passport. There is, therefore, no need—or logical reason—to subject the cancellation of CRBAs (which only document the acquisition of citizenship) to the same standards as cancellation of naturalization certificates (which are effectively the only means of proving citizenship status). Contrary to the district court's conclusion, the State Department was not "taking away" Hizam's citizenship when it canceled his CRBA; it was only canceling the document it issued and correcting its own prior mistake. Those actions are not equivalent to loss of nationality or denaturalization. See *Kelso v. U.S. Dep't of State*, 13 F. Supp. 2d 1, 4 (D.D.C. 1998) ("Yet to admit that passports are evidence of citizenship is to say nothing about whether their revocation implicates the fundamental right of citizenship." (citing *Agee*, 453 U.S. at 309-10)).

In any event, even if § 2705 could be read as the Ninth Circuit did in Magnuson, such that the provision precludes the State Department from revoking a CRBA or U.S. passport without meeting the procedural and substantive requirements for canceling naturalization or citizenship certificates, the enactment of § 1504 four years later effectively overruled that decision. By clearly confirming that the State Department has the authority to cancel CRBAs and U.S. passports that have been issued "erroneously," and to do so without a pre-cancellation hearing, Congress laid to rest any argument that either § 2705 or any other statute abrogates that preexisting power.

ii. Section 1504 Is Not Impermissibly Retroactive

Second, although the State Department's inherent authority to correct its error was alone sufficient to revoke Hizam's documents, its action was also justified by § 1504, which is not impermissibly retroactive.

As the Supreme Court held in Landgraf v. USI Film Products, although there is a presumption against retrospective application of statutes, "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment."

511 U.S. at 269-70 (citation omitted). Only a statute that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." *Id*. at 269 (quotation marks omitted). In determining whether a statute should be subject to the presumption against retroactivity, a court should look to "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id*. at 270. Central to this analysis is whether a statute "impos[es] new burdens on persons after the fact." *Id*.

However, "[w]hen the intervening statute authorizes. . . prospective relief, application of the new provision is not retroactive." *Id*. at 273. Similarly, an intervening statute that "takes away no substantive right but simply changes the tribunal" is one that "speak[s] to the power of the court rather than to the rights or obligations of the parties" and is therefore not retroactive. *Id*. at 274.

Under these standards, § 1504 is not impermissibly retroactive. To begin with, the statute merely confirms preexisting authority—and, as the Court held in *Landgraf*, when "even before the enactment of [a statute]" the same or similar authority existed, the statute "simply 'did not impose an additional or unforeseeable obligation' " on any person. *Landgraf*, 511 U.S. at 277-78 (quoting *Bradley v. School Board of Richmond*, 416 U.S. 696, 721 (1974)). There is accordingly no bar to applying such a statute to preenactment conduct.

Even if the Court were to conclude that § 1504 did more than confirm the State Department's prior authority, it did not affect substantive rights or impose burdens. As the *Landgraf* Court noted, even when procedural rights and obligations of parties may have changed, it remains permissible to apply new rules to prior facts when those parties' underlying substantive rights and obligations are unaffected. 511 U.S. at 276. Thus, for instance, when "new hearing procedures did not affect either party's obligations under [a] lease agreement," those procedures can be applied to acts taken before the procedures were issued. *Id*.…. Similarly, here, Hizam's underlying right or lack of a right to citizenship was unaffected by passage of § 1504, which "speak[s] to the power of" the State Department rather than the rights of individuals. 511 U.S. at 274. Hizam either acquired US. citizenship at birth or he did not, an issue unaffected by the State Department's power to later correct errors in issuing documents.

* * * *

…The government recognizes the inequity of this situation, and although the State Department lacks any legal authority to confer citizenship or other immigration status on Hizam, it has brought the matter to the attention of U.S. Citizenship and Immigration Services, and will continue to support other lawful means to provide relief to Hizam, including a private bill in Congress should one be introduced.

Nevertheless, the unfairness occasioned in one particular case is no reason to undermine or disregard well-established legal rules grounded in important constitutional and policy concerns. …

* * * *

On May 13, 2013, the United States filed a reply brief in the case, also available at www.state.gov/s/l/c8183.htm. The reply brief reiterates the points made in the U.S.

opening brief, but also responds to Hizam's argument that the U.S. interpretation of the statute permitting revocation of his erroneously issued documentary proof of citizenship conflicts with international law. The U.S. reply brief is excerpted below.*

* * * *

Finally, Hizam argues that the Court should apply the *Charming Betsy* canon of statutory construction, that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.). According to Hizam, "[r]eading 8 U.S.C. § 1504 as authorizing retroactive revocation of CRBAs for agency error risks the possibility of statelessness for the class of individuals in the same position as Mr. Hizam." (Hizam Br. 26). Therefore, Hizam argues, "the scope of § 1504 must be determined in light of the international norm against policies that lead to statelessness." (Hizam Br. 26). But Hizam does not allege that he himself would be rendered stateless by application of § 1504, or that he lacks citizenship in Yemen or elsewhere. He accordingly has no standing to raise this argument. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 & n.1 (1992) (to support standing, "injury must affect the plaintiff in a personal and individual way"). Even if Hizam holds no citizenship in any other country, his statelessness results from his undisputed lack of U.S. citizenship, not from the cancellation of his CRBA under § 1504. And the arguments Hizam asserts are speculative and unsupported: he contends that unspecified "individuals in the same position" risk "the possibility of statelessness" because unnamed "[c]ertain countries will not provide citizenship to the children of U.S. citizens," and "[s]till other [unidentified] countries consider individuals who acquire foreign citizenship to have abandoned any prior citizenship." (Hizam Br. 26-27).

Moreover, Hizam has misapplied the *Charming Betsy* canon. The rule of interpretation applies to an "ambiguous statute," but not "where the statute at issue admits no relevant ambiguity." *Oliva v. U.S. Dep't of Justice*, 433 F.3d 229, 235 (2d Cir. 2005). Here, § 1504 is clear: it explicitly permits the Secretary of State to cancel CRBAs and U.S. passports that were "illegally, fraudulently, or erroneously obtained," 8 U.S.C. § 1504, making the determination of whether to cancel those documents rest solely on those factors. And if the Court were required to construe the statute "not to conflict with international law," *Oliva*, 433 F.3d at 235, Hizam has identified no controlling principle of international law, instead offering only the U.S. government objective of reducing statelessness, and citing an international convention to which neither the United States nor Yemen is a party.[11]

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* Editor's note: On March 12, 2014, the U.S. Court of Appeals for the Second Circuit issued its decision in the case, reversing the district court and remanding with instructions to dismiss the case. *Hizam v Kerry*, No. 12-3810 (2d. Cir. 2014). *Digest 2014* will discuss the appeals court's decision.

[11] A list of parties to the Convention Relating to the Status of Stateless Persons is available at http://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTSONLINE&mtdsg_no=V~3&chapter=5&Temp=mtdsg2&lang=en. Hizam offers no argument that the Convention is otherwise accepted as internationallaw. Nor does he cite any provision of the Convention—which generally addresses the treatment of stateless persons—that supports his view that it embodies a broad "international norm against policies that lead to statelessness." (Hizam Br. 26).

* * * *

B. PASSPORTS

1. *United States v. Moreno*

In *United States v. Moreno*, No. 12-1460, 727 f.3d 255 (3d Cir. Jul. 3, 2013), a defendant in a criminal case appealed her conviction for falsely and willfully representing herself as a United States citizen in violation of 18 U.S.C. § 911. The defendant argued that "her validly issued passport constitutes conclusive proof of U.S. citizenship under 22 U.S.C. § 2705," and therefore, "the government failed to prove lack of citizenship." *Id.* at *1. On July 3, 2013, the U.S Court of Appeals for the Third Circuit issued its opinion, rejecting the defendant's argument, and holding that "[b]y its text, § 2705 provides that a passport will serve as conclusive proof of citizenship only if it was 'issued by the Secretary of State *to a citizen of the United States*.'" *Id.* at *3 (quoting 22 U.S.C. § 2705) (emphasis added by court). Excerpts from the court's opinion appear below (with footnotes omitted).

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By its text, § 2705 provides that a passport will serve as conclusive proof of citizenship only if it was "issued by the Secretary of State *to a citizen of the United States.*" 22 U.S.C. § 2705 (emphasis added). Under the plain meaning of the statute, a passport is proof of citizenship only if its holder was actually a citizen of the United States when the passport was issued. Under the language of the statute, the logical premise needed to establish conclusive proof of citizenship consists of two independent conditions: (1) having a valid passport and (2) being a U.S. citizen. The second condition is not necessarily satisfied when the first condition is satisfied. For example, the Secretary of State issues passports not only to U.S. citizens but also to U.S. nationals. *See* 22 C.F.R. § 50.4 (noting that United States nationals may apply for a United States passport); *see also* 8 U.S.C. § 1101(22) ("The term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.").

Here, Moreno satisfies the first condition but not the second: she has a valid U.S. passport but is not a U.S. citizen—and was not one at the time the passport was issued. …

This is an issue of first impression in the Third Circuit. Moreno argues that other courts …have interpreted § 2705 as establishing that a valid passport is conclusive proof of U.S. citizenship. *See, e.g., Vana v. Att'y Gen.*, 341 F. App'x 836, 839 (3d Cir. 2009) (per curiam) ("[A] United States passport is considered to be conclusive proof of United States citizenship… ."); *Magnuson v. Baker*, 911 F.2d 330, 333 (9th Cir. 1990) ("[T]hrough section

2705, Congress authorized passport holders to use the passport as conclusive proof of citizenship.") (dictum)…

However, we are not bound by these cases and believe that this interpretation is atextual because it effectively reads the phrase "to a citizen of the United States" out of the statute. Thus, it does not give effect to the statute as written. … Because the text of § 2705 is unambiguous, we hold that a passport is conclusive proof of citizenship only if its holder was actually a citizen of the United States when it was issued.

* * * *

2. *Edwards v. Bryson*

The Third Circuit reaffirmed its holding in *Moreno* in another case decided on August 26, 2013, *Edwards v. Bryson*, No. 12-3670, 2013 WL 4504783 (3d Cir. Aug. 26, 2013). In *Edwards*, the plaintiff brought a declaratory judgment action under § 1503 following denial of a certificate of citizenship. The district court held that the plaintiff satisfied his prima facie burden by producing an expired U.S. passport, and the Government had failed to satisfy its burden of presenting clear and convincing evidence to disprove the Secretary of State's prior determination. On appeal, the Third Circuit reversed, in light of the holding in *Moreno* (discussed *supra*), and remanded the case with directions to enter judgment in favor of the Government. Excerpts from the court's opinion appear below.

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Edwards's declaratory judgment action entitled him to a *de novo* proceeding before an Article III court to determine whether he is a United States citizen. *Delmore v. Brownell*, 236 F.2d 598, 599 & n.1 (3d Cir. 1956). In the § 1503(a) proceeding before the District Court, Edwards bore "the burden of proving his citizenship by a preponderance of the evidence." *Id.* at 600. The District Court held that Edwards's expired passport was sufficient to satisfy this burden. *Edwards v. Bryson*, 884 F. Supp. 2d 202, 205-06 (E.D. Pa. 2012). The District Court's decision relied principally on 22 U.S.C. § 2705. Section 2705 provides that a "passport, during its period of validity (if such period is the maximum period authorized by law), issued by the Secretary of State to a citizen of the United States" will serve as conclusive proof of United States citizenship. 22 U.S.C. § 2705. In light of § 2705 and because Edwards had been issued a passport, the District Court held that, although there was a dispute as to whether "an expired passport can serve as conclusive proof of citizenship, there is no doubt that it is sufficient to establish by a preponderance of the evidence that Edwards is a U.S. citizen." *Edwards*, 884 F. Supp. 2d at 206.

While Edwards's appeal was pending, we interpreted 22 U.S.C. § 2705 as providing that a passport will serve as conclusive proof of United States citizenship only if "its holder was actually a citizen of the United States when the passport was issued." *United States v. Moreno*, --- F.3d ---, No. 12-1460, 2013 WL 3481488, at *3 (3d Cir. July 3, 2013). Here, however, the District Court held that, under § 2705, Edwards's expired passport was conclusive proof of his

citizenship, even though there was no evidence that he was actually a citizen when his passport was issued to him. *Edwards*, 884 F. Supp. 2d at 206. This ruling is inconsistent with our decision in *Moreno*.

It is acknowledged by the parties that Edwards was not already a citizen of the U.S. when his passport was issued in 1991. Edwards's argument has been that he is a U.S. citizen based on the passport issued to him. He has made no showing that, at the time he obtained the passport, he was a U.S. citizen. Under M*oreno*, therefore, his passport is not conclusive proof of his U.S. citizenship and he has failed to meet his burden under 8 U.S.C. § 1503(a). *See Delmore*, 236 F.2d 598, 600.

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C. IMMIGRATION AND VISAS

1. *De Osorio*: Status of "Aged-Out" Child Aliens Who Are Derivative Beneficiaries of a Visa Petition

On January 25, 2013, the United States filed a petition for writ of certiorari in the United States Supreme Court in a case decided by the U.S. Court of Appeals for the Ninth Circuit, *Mayorkas v. De Osorio*, No. 12-930. In *De Osorio*, a majority of the en banc court of appeals held that the Board of Immigration Appeals ("BIA" or "Board") had misinterpreted a provision of the Immigration and Nationality Act ("INA") which the court deemed unambiguous, 8 U.S.C. § 1153(h)(3). Section 1153(h)(3) addresses how to treat an alien who reaches age 21 ("ages out"), and therefore loses "child" status under the INA. The BIA determined that, if a new petition and petitioner were required, the alien's priority date for a visa would be determined by the date of a subsequently-filed visa petition, and not the date of the original petition as to which the alien was a derivative beneficiary.

Under the INA, U.S. citizens and lawful permanent resident aliens may petition for certain family members to obtain visas to immigrate to the United States or to adjust their status in the United States to that of a lawful permanent resident. The INA limits the total number issued annually for each of the family-preference categories, including F3, the category for married sons and daughters of U.S. citizens, and F4, the category for brothers and sisters of U.S. citizens. The citizen or lawful permanent resident files a petition for a family member, who is known as the principal beneficiary. Approval of the petition places the principal beneficiary in line to wait for one of the limited number of visas allotted each year, based on the priority date, which is typically the date the petition was filed.

A principal beneficiary can also add certain "derivative" beneficiaries, the principal beneficiary's spouse and unmarried children under age 21. By the time the principal beneficiary reaches the front of the line for a visa, however, the "child" derivative beneficiary may have "aged out," or reached his or her twenty-first birthday. In that event, the aged-out alien cannot claim derivative-beneficiary status. The Child Status

Protection Act ("CSPA"), enacted in 2002, addresses the treatment of children under the immigration laws, permitting certain beneficiaries who have reached or passed the age of 21 to nevertheless retain "child" status for purposes of the priority date for visa availability, essentially if the aging out was caused by administrative delay. Section 1153(h)(3), the subject of *De Osorio*, pertains to aged-out aliens who do not qualify as a "child" even after application of the CSPA's age-reduction formula. It provides that "[i]f the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition."

The *De Osorio* case arose out of suits filed by groups of plaintiffs in federal district court claiming that their aged-out derivative beneficiaries had incorrectly been denied relief under Section 1153(h)(3) when the priority dates of the principal beneficiaries' petitions were not used in determining the aged-out aliens' eligibility for visas. The district court granted summary judgment for the U.S. government, finding that the BIA's interpretation of Section 1153(h)(3) was reasonable and entitled to deference. A panel of the Ninth Circuit Court of Appeals affirmed. The panel explained that Section 1153(h) could be read to apply to all derivative beneficiaries, but also could be read to exclude some beneficiaries from its reach: those who aged out of derivative-beneficiary status with respect to petitions that cannot "automatically be converted" to a family-preference category that covers a person age 21 or older because in order to obtain such a preference it would be necessary for a different petitioner to file a new petition. The panel concluded that deference to the BIA's interpretation was appropriate. The court of appeals granted rehearing en banc, vacated the panel opinion, and reversed and remanded in a 6-5 decision.

On June 24, 2013, the Supreme Court granted certiorari. The United States filed its brief on September 3, 2013, arguing that the en banc court erred in concluding that Section 1153(h)(3) was unambiguous in covering aged-out former derivative beneficiaries of F3 and F4 petitions and that the BIA's interpretation of the provision should be accorded deference. Excerpts below are from the Summary of Argument section of the brief. The brief in its entirety, as well as the petition for writ of certiorari, are available at *www.state.gov/s/l/c8183.htm.* The Supreme Court heard oral arguments in the case on December 10, 2013.

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The Ninth Circuit erred in ruling that Section 1153(h)(3) unambiguously extends a special priority status to aged-out former derivative beneficiaries of F3 and F4 immigrant-visa petitions and definitively forecloses the Board's narrower interpretation. Rather, as the Board recognized, Section 1153(h)(3) is sensibly read to grant a special priority only to aliens whose petitions can "automatically be converted" from one "appropriate" family-preference "category" to a different one without the need for a new petitioner and a new petition, 8 U.S.C. 1153(h)(3)—a group that

does not include respondents' children (and others like them). The Board's reasonable construction of the provision merits *Chevron* deference, which is "especially appropriate in the immigration context." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

First, the Ninth Circuit's conclusion that Section 1153(h)(3) has an unambiguously broad scope cannot be reconciled with the provision's statement that "the alien's petition shall automatically be converted to the appropriate category." 8 U.S.C. 1153(h)(3). That statement contains a number of discrete requirements: that the petition as to which the alien was a beneficiary prior to aging out is the only petition eligible for conversion; that the transformation of the petition is of a limited nature, consisting only of movement from one valid and appropriate category to another; and that the conversion must take place automatically, without gaps in time or external events like the intervention of a new petitioner.

All of those requirements are readily satisfied with respect to certain aliens covered by the statutory subsections to which Section 1153(h)(3) refers. But the requirements cannot be met with respect to the kind of petitions at issue in this case—F3 and F4 petitions as to which an aged-out alien was formerly entitled to derivative status as a child. No "appropriate category" exists under which the original F3 or F4 petitioner could petition for an aged-out former derivative beneficiary—that is, the petitioner's grandchild, niece, or nephew. And while the aged-out person's own parent might at some point qualify as a lawful permanent resident who could file an F2B petition for his or her adult son or daughter, the shift from an F3 or F4 petition to a new F2B petition that might possibly be filed at some later point by a different person, depending on how various contingencies are resolved, cannot reasonably be characterized as an "automatic[] *** conver[sion]" of "the alien's petition."

That interpretation of the conversion language of Section 1153(h)(3) is bolstered by the limited way in which Congress used the term "converted" (or its variants) elsewhere in the CSPA itself, as well as by the way that the term "conversion" is used in regulations in place when the CSPA was enacted. In particular, the provision at issue in this case was sandwiched at enactment between other CSPA provisions that use "converted" to describe recategorization of an existing petition based on changed circumstances, not the filing of a new petition or the replacement of the original petitioner with a different one.

Second, no other aspect of the text of Section 1153(h)(3) supports the Ninth Circuit's ruling. While the first half of that provision refers to Section 1153(h)(1), that reference does not indicate that all petitions covered by Section 1153(h)(1) are necessarily subject to automatic conversion under Section 1153(h)(3). Indeed, it is precisely the tension between the two halves of Section 1153(h)(3)'s single sentence that makes the provision ambiguous, and the Ninth Circuit erred by focusing on the first half and effectively ignoring the succeeding text. In addition, Section 1153(h)(3) cannot reasonably be read to make automatic conversion and priority-date retention separate and independent benefits. The provision applies only if automatic conversion is available, while also clarifying that a converted petition should be given its original priority date rather than a new priority date corresponding to the date of the conversion.

Third, the broad interpretation of Section 1153(h)(3) adopted by the Ninth Circuit is inconsistent with the overall statutory scheme because it would substantially disrupt the immigrant-visa system. That interpretation would "not permit more aliens to enter the country or keep more families together," Pet. App. 35a (dissenting opinion), but would negatively affect many aliens who have been waiting for a visa for a long time by pushing aliens such as respondents' sons and daughters—likely tens of thousands of people—to the front of the line. Because changing priority dates is a "zero-sum game," ibid., such reshuffling would

substantially increase the wait times of others currently in line, with many resulting unfairnesses. The Board's narrower interpretation of Section 1153(h)(3), in contrast, does not create such difficulties. If Congress had intended the kind of far-reaching change that the Ninth Circuit's reading dictates, it would undoubtedly have said so far more clearly.

Finally, the legislative history of the CSPA does not support the view that Section 1153(h)(3) unambiguously applies in this case. The legislative history is of limited usefulness here; Congress did not specifically discuss Section 1153(h)(3), and the relevant history primarily consists of floor debate, which is weak evidence of congressional intent. Nevertheless, nothing in that debate suggests that Congress intended to create the striking disruption that the Ninth Circuit's reading of Section 1153(h)(3) would require. Rather, the debate suggests that Section 1153(h)(3), which was not directed at the administrative-delay problem on which Congress was focused, was intended to work only a limited change—one that modestly expanded the scope of an existing regulatory provision.

For all of these reasons, the Board's narrower interpretation of Section 1153(h)(3) is a reasonable one. And while the Ninth Circuit did not reach the question of whether the Board's interpretation of Section 1153(h)(3) is entitled to Chevron deference, such deference is appropriate. The Board applied its expertise to the whole statutory and regulatory scheme at issue, and chose a reading of Section 1153(h)(3) that works seamlessly with related provisions while also giving full force to the automatic-conversion language that Congress enacted. In addition, the Board made a sensible policy choice not to interpret Section 1153(h)(3) to grant special priority status to independent adults at the expense of the aliens already patiently waiting in the visa line that those adults would join.

* * * *

2. Consular Nonreviewability

On September 9, 2013, the United States filed a petition for rehearing en banc in the U.S. Court of Appeals for the Ninth Circuit in *Din v. Kerry*, No. 10-16772. Plaintiff, Fauzia Din, a U.S. citizen, brought suit in federal court after the denial of a visa application filed by her husband, an Afghan citizen. The district court dismissed plaintiff's complaint. A panel of the U.S. Court of Appeals for the Ninth Circuit reversed, applying the limited judicial review of visa decisions permitted under *Mandel v. Kliendienst*, 408 U.S. 753 (1972), as extended in the Ninth Circuit by *Bustamonte v. Mukasey*, 531 F.3d 1059 (9th Cir. 2008) (extending standing to invoke *Mandel* to U.S. citizen spouses of visa applicants). The Ninth Circuit in *Din* held that the government's identification of a statutory ground for a visa refusal based on terrorism-related activity did not constitute a "facially legitimate" reason necessary to satisfy *Mandel* and remanded to the district court for further proceedings. Excerpts (with footnotes and citations to the record omitted) follow from the U.S. brief in support of rehearing en banc. The brief in its entirety is available at *www.state.gov/s/l/c8183.htm*. On December 24, 2013, the petition for rehearing was denied.

* * * *

2. Plaintiff Fauzia Din is a United States citizen who, in 2006, married Kanishka Berashk, an Afghan citizen who resides in Afghanistan. Berashk has worked for the Afghan Ministry of Social Welfare since 1992, including during the period when the Taliban controlled the country. Shortly after Din and Berashk were married, Din filed an immigrant visa petition for Berashk. The United States Citizenship and Immigration Services notified Din that it approved the petition. But after Berashk's interview at the United States Embassy in Islamabad, a consular officer denied Berashk's visa application, citing 8 U.S.C. § 1182(a)(3)(B), a provision making an alien inadmissible on terrorism-related grounds.

Din brought suit, seeking review of the visa denial and alleging that the government's action impaired her constitutionally protected interest in her marriage to Berashk. The district court granted the government's motion to dismiss, holding that the government's identification of 8 U.S.C. § 1182(a)(3)(B) was a "facially legitimate" reason for the denial and that Din had not established that the reason was not "bona fide."

The panel majority reversed. *Din v. Kerry*, 718 F.3d 856 (9th Cir. 2013). The Court determined that it had authority to review the consular officer's visa denial because, in a prior decision, the Court "recognized that a citizen has a protected liberty interest in marriage that entitles the citizen to review of a spouse's visa." *Id*. at 860; *see Bustamante*, 531 F.3d at 1062. The Court held that the government's identification of a "properly construed" statutory ground for exclusion combined with a consular officer's assurance that he or she had reason to believe that the ground applies to the visa applicant would be a facially legitimate reason for the denial. *Din*, 718 F.3d at 861. But the Court held that the government failed to satisfy that standard in this case because it cited only the general terrorism exclusion provision and failed to make any specific allegation that Berashk had engaged in behavior coming within a specific provision. *Id*. at 863.1.

* * * *

ARGUMENT

1. *En banc* review is merited because the panel majority's threshold decision to except this case from the doctrine of consular nonreviewability conflicts with precedent from within and without the Ninth Circuit and improperly encroaches on Congress's plenary authority over the admission of aliens.

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…[O]ther courts of appeal have held that a United States citizen has no constitutional right to have an alien spouse reside with him or her in the United States. *See, e.g.*, *Bangura v. Hansen*, 434 F.3d 487, 495-96 (6th Cir. 2006); *Garcia v. Boldin*, 691 F.2d 1172, 1183 (5th Cir. 1982); *Burrafato v. U.S. Dep't of State*, 523 F.2d 554, 555 (2d Cir. 1975); *Silverman v. Rogers*, 437 F.2d 102, 107 (1st Cir. 1970); *Swartz v. Rogers*, 254 F.2d 338, 339 (D.C. Cir. 1958); *see also Flores*, 507 U.S. at 303 ("The mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it.").

…[T]he visa denial in this case in no way interfered with Din's decision to marry Berashk; that marriage occurred before Berashk had even applied for the visa. Nor does the visa

decision nullify the marriage or deprive Din and Berashk the legal benefits of marriage, or prevent them from living together anywhere other than in the United States. *Cf. Swartz*, 254 F.2d at 339 ("Certainly deportation would put burdens upon the marriage. It would impose upon the wife the choice of living abroad with her husband or living in this country without him. But deportation would not in any way destroy the legal union which the marriage created."). Thus, the panel majority erred in concluding that the visa denial implicated Din's liberty interest in the freedom of choice in marriage. More fundamentally, Din's general liberty interest in marriage cannot properly be the basis for judicial review of Berashk's visa denial when the more specific interest—a United States citizen's interest in having an alien spouse join her in the United States—is not. *See Glucksberg*, 521 U.S. at 721-22.

The panel majority's threshold decision to engage in judicial review of a consular officer's visa determination is thus premised on an incorrect determination that the decision implicated Din's constitutionally protected-interest, whether that interest is in the freedom of choice in marriage or in the presence of an alien spouse in the United States. In overriding the doctrine of consular nonreviewability, the panel majority improperly encroached on Congress's plenary authority to determine the conditions for the admission of aliens into the United States. That error constitutes a significant violation of the separation of powers and is serious enough to merit *en banc* reconsideration.

2. The panel majority's application of limited judicial review was equally flawed. The panel majority held that, to provide a "facially legitimate" reason for a visa denial, the government must identify a statutory "ground narrow enough to allow [the court] to determine that it has been 'properly construed.' " *Din*, 718 F.3d at 862. The government also must allege facts sufficient for the court to determine whether they "constitute a ground for exclusion under the statute." *Id*. at 863. In so holding, the panel majority overstepped the role assigned to the courts in immigration and national security matters. *See Mezei*, 345 U.S. at 212 ("[B]ecause the action of the executive officer under such authority is final and conclusive, the [Executive Branch] cannot be compelled to disclose the evidence underlying [its] determinations in an exclusion case.").

The Supreme Court has recognized that the Constitution assigns to the political branches the authority for protecting the national security, thus requiring judicial deference to Congress and the Executive's national security judgments. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (noting the "heightened deference to the judgments of the political branches with respect to matters of national security"); *Department of Navy v. Egan*, 484 U.S. 518, 530 (1988) ("[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."). The Supreme Court also has recognized a direct connection between Congress's plenary authority over the admission of aliens and its authority over national security. *See Galvan v. Press*, 374 U.S. 522, 530 (1954) ("The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security.").

Typically, when a consular officer denies a visa application because the officer has determined that the alien is inadmissible on a statutory ground, Congress requires the officer to provide the alien with written notice that "states the determination" and that "lists the specific provision or provisions of law under which the alien is inadmissible." 8 U.S.C. § 1182(b)(1). Congress has, however, made the notice requirement inapplicable to visa denials made on terrorism-related grounds. 8 U.S.C. § 1182(b)(3). Although neither the statute nor the legislative

history explain why Congress enacted that notice exception, that exception unambiguously furthers the ability of the Executive Branch to protect the national security and to conduct terrorism-related investigations by avoiding the disclosure of potentially sensitive information when denying a visa to an alien who a consular officer has determined is inadmissible, based on terrorism-related grounds.

In addition, information supporting a visa denial pursuant to 8 U.S.C. § 1182(a)(3)(B) often is classified, would jeopardize public safety if revealed, is permitted for only limited use by another agency, or is related to an ongoing investigation. Providing such information to an individual visa applicant, even if possible to do so in an unclassified form, may reveal details about national security investigations and operations. For that reason, if courts were to require the Department of State to identify factual allegations supporting a consular officer's visa denial on national security grounds, other agencies would be less willing to share intelligence or other sensitive information with consular officers, making it more difficult for such officers to exclude aliens who could be threats to the national security. It is for such reasons that Congress has given consular officers discretion whether to even notify an alien the statutory ground for a decision that is based on terrorism-related grounds. 8 U.S.C. §1182(b)(3).2.

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3. Visa and Immigration Information-Sharing Agreements

a. United Kingdom

On April 18, 2013, representatives of the governments of the United States and the United Kingdom signed an agreement "For the Sharing of Visa, Immigration, and Nationality Information." The full text of the agreement is available at *www.state.gov/s/l/c8183.htm*. The stated purpose of the agreement is "to assist in the effective administration and enforcement of the respective immigration and nationality laws of the Parties regarding Nationals of a Third Country" by sharing information about those third country nationals through a settled process for exchanging information. The agreement includes provisions relating to the use, disclosure, and protection of the information exchanged. The U.S.-U.K. agreement entered into force on November 8, 2013 after an exchange of diplomatic notes in accordance with the terms of the agreement.

b. Canada

The U.S.-Canada Visa and Immigration Information-Sharing Agreement, discussed in *Digest 2012* at 7-8, entered into force on November 21, 2013 after an exchange of diplomatic notes in accordance with the terms of the agreement.

D. ASYLUM, REFUGEE, AND MIGRANT PROTECTION ISSUES

Section 244 of the Immigration and Nationality Act ("INA" or "Act"), as amended, 8 U.S.C. § 1254a, authorizes the Secretary of Homeland Security, after consultation with appropriate agencies, to designate a state (or any part of a state) for temporary protected status ("TPS") after finding that (1) there is an ongoing armed conflict within the state (or part thereof) that would pose a serious threat to the safety of nationals returned there; (2) the state has requested designation after an environmental disaster resulting in a substantial, but temporary, disruption of living conditions that renders the state temporarily unable to handle the return of its nationals; or (3) there are other extraordinary and temporary conditions in the state that prevent nationals from returning in safety, unless permitting the aliens to remain temporarily would be contrary to the national interests of the United States. The TPS designation means that eligible nationals of the state (or stateless persons who last habitually resided in the state) can remain in the United States and obtain work authorization documents. For background on previous designations of states for TPS, see *Digest 1989–1990* at 39–40; *Cumulative Digest 1991–1999* at 240-47; *Digest 2004* at 31-33; *Digest 2010* at 10-11; *Digest 2011* at 6-9; and *Digest 2012* at 8-14. In 2013, the United States extended TPS designations for El Salvador, Honduras, and Nicaragua, and both redesignated and extended the designations for Sudan and South Sudan, as discussed below.

1. El Salvador, Honduras, and Nicaragua

On May 30, 2013, the Department of Homeland Security ("DHS") announced the extension of the designation of El Salvador for TPS for 18 months from September 10, 2013 through March 9, 2015. 78 Fed. Reg. 32,418 (May 30, 2013). The extension was based on the determination that there continues to be a substantial, but temporary, disruption of living conditions in El Salvador resulting from the series of earthquakes in 2001, and El Salvador remains unable, temporarily, to adequately handle the return of its nationals.

On April 3, 2013, DHS announced the extension of the designation of Honduras for TPS for 18 months from July 6, 2013 through January 5, 2015. 78 Fed. Reg. 20,123 (Apr. 3, 2013). The extension was based on the determination that, there continues to be a substantial, but temporary, disruption of living conditions in Honduras resulting from Hurricane Mitch, and Honduras remains unable, temporarily, to handle adequately the return of its nationals.

Also on April 3, 2013, DHS announced the extension of the designation of Nicaragua for TPS for 18 months from July 6, 2013 through January 5, 2015. 78 Fed. Reg. 20,128 (Apr. 3, 2013). The extension was based on the determination that, there continues to be a substantial, but temporary, disruption of living conditions in Nicaragua resulting

from Hurricane Mitch, and Nicaragua remains unable, temporarily, to handle adequately the return of its nationals.

2. Sudan and South Sudan

On January 9, 2013, DHS announced that it was both extending the existing designation of South Sudan for TPS for 18 months and redesignating South Sudan for TPS for 18 months, effective May 3, 2013 through November 2, 2014. 78 Fed. Reg. 1866 (Jan. 9, 2013). DHS also announced on the same day that it was likewise both extending the designation of, and redesignating, Sudan for TPS for the same period. 78 Fed. Reg. 1872. The redesignation of each country allows additional individuals residing continuously in the United States since January 9, 2013 to obtain TPS benefits, if eligible. The extension and redesignation of each country were based on a determination that conditions in each country have continued to deteriorate and there continues to be a substantial, but temporary, disruption of living conditions in each country based upon ongoing armed conflict and extraordinary and temporary conditions that prevent nationals of each from returning in safety.

3. Somalia

On November 1, 2013, DHS announced that it was extending the existing designation of Somalia for TPS for 18 months through September 17, 2015. 78 Fed. Reg. 65,690 (Nov. 1, 2013). The extension was based on the determination that conditions in Somalia that prompted the TPS designation continue to be met, namely there continues to be a substantial, but temporary, disruption of living conditions in Somalia based upon ongoing armed conflict and extraordinary and temporary conditions in that country that prevent Somalis who have TPS from safely returning.

4. Syria

On June 17, 2013, DHS announced that it was both extending the existing designation of Syria for TPS for 18 months and redesignating Syria for TPS for 18 months, effective October 1, 2013 through March 31, 2015. 78 Fed. Reg. 36,223 (June 17, 2013). The extension was based on the determination that an extension and redesignation are warranted because the extraordinary and temporary conditions in Syria that prompted the 2012 TPS designation have not only persisted, but have deteriorated, and because there is now an on-going armed conflict in Syria that would pose a serious threat to the personal safety of Syrian nationals if they were required to return to their country. The redesignation of Syria allows additional individuals who have been continuously residing in the United States since June 17, 2013 to obtain TPS, if otherwise eligible.

Cross References

Nationality in Libya claims cases, **Chapter 8.C.1.**
Diplomatic relations, **Chapter 9.A.**
*Suit seeking to record Israel as place of birth on passport (*Zivotofsky*)*, **Chapter 9.C.**
Somalia, **Chapter 9.B.1**, **Chapter 16.A.7.D.**, and **Chapter 17.B.7**
Sudan and South Sudan, **Chapter 17.B.6.**